SMALL CAUSE COURT REFERENCE.

Before Mr. Justice Wilson and Mr Justice Trevelyan.

1889
March 6.

BOISTUB CHURN NAUN AND OTHERS *v.* WOOMA CHURN SEN.*

Excise Act (Bengal Act VII of 1878)—Revenue, Protection of—Contract Act (IX of 1872), s. 23—Public policy.

The Bengal Excise Act of 1878 is not an Act framed solely for the protection of the revenue, but is one embracing other important objects of public policy as well.

An agreement, therefore, for the sale of fermented liquors, entered into by a person who has not obtained a license under that Act, is void and cannot be recovered on.

SUIT to recover money for goods sold and delivered.

The plaintiffs who had not taken out a license for the sale of fermented liquors, under Bengal Act VII of 1878, sold to the defendant a certain quantity of porter and beer, and sued him for the price thereof.

The defendant contended that the contract was void under s. 23 of the Contract Act, inasmuch as the plaintiffs had sold the goods without obtaining a license under the Excise Act.

The Chief Judge of the Small Cause Court held that the Excise Act of 1878 was an Act framed in the interest of the public, and that the contract under which the goods were sold by the plaintiffs, who were unlicensed, was void under s. 23 of the Contract Act, and that, therefore, this suit to recover the price of the goods so sold would not lie; he therefore dismissed the suit, but, at the request of the parties, referred the following question (amongst others) to the High Court, *viz.* :—

4. Is the agreement void having regard to the provisions of the Bengal Excise Act of 1878?

Mr. *Acworth* (with him Baboo *Kali Nath Mitter*) for the plaintiffs.—The Bengal Excise Act is purely a Revenue Act, and has no

* Small Cause Court Reference No. 7 of 1888, made by H. Millett, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 24th of July 1888.

such effect, as has been given to it, on the contract of sale. There is no section in the Act which forbids such a suit as the present. This case does not fall within *Bexley* v. *Bignold* (1); nor is the passage in p. 487 of Maxwell on Statutes referred to by the Judge applicable. Revenue Acts are treated as being for the protection of the revenue and not on grounds of public policy. I submit the contract was not illegal. See Maxwell on Statutes, p. 490, and *Bailey* v. *Harris* (2) decided on 2 Wm. IV, c. 16, s. 12, and 6 Geo. IV, c. 80, s. 115. See also *Brown* v. *Duncan* (3); *Johnson* v. *Hudson* (4) decided under 29 Geo. III, c. 68, ss. 72 and 124; *Smith* v. *Mawhood* (5) decided under 6 Geo. IV, c. 81, s. 26.

Mr. *Dill* for the defendant.—The Excise Act has for its object the protection of the public as well as the revenue. As to cases on similar statutes in force in England, and to the general rule deducible from such statutes, see Benjamin on Sales, 526. Sections 11 and 53 of the Bengal Excise Act show it was the intention of the Legislature to prevent the sale without license of anything but very small quantities of fermented liquors, and the distinction drawn in that section between "tari" and fermented liquors shows that it is the question of these liquors being intoxicating which is paramount; the case of *Ritchie* v. *Smith* (6) was decided on the Statute 9 Geo. IV, c. 61, which was held to be for the protection of public morals as well as of the revenue. The case of *Judoonath Shaha* v. *Nobin Chunder Shaha* (7), decided on Bengal Act II of 1866, decides that an agreement having for its object the carrying on a trade in contravention of the Excise Law is illegal—See also *Hormasji Motabhai* v. *Pestanji Dhanjibhai* (8) and *Debi Prasad* v. *Rup Ram*, (9). Sections 14, 29 and 50 of the Bengal Excise Act also show that one of the objects of the Legislature in passing the Act was the prevention of drunkenness.

Mr. *Acworth* in reply.—No cases have been cited by the other side showing that a sale similar to the present contract

(1) 5 B. & Ald., 335.
(2) 12 Q. B., 905.
(3) 10 B & C., 93.
(4) 11 East, 180.
(5) 14 M. & W., 452.
(6) 6 C. B., 462.
(7) 21 W. R., 289.
(8) I. L. R., 12 Bom., 422.
(9) I. L. R., 10 All., 578.

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of sale has been held to be void; I however admit that there are cases somewhat resembling those in which contracts have been held to be void on grounds of public policy or under some particular statute. In *Ritchie* v. *Smith* (1) the case of a sale was expressly exempted, and the Court in the course of argument expressly stated that it was not intended to touch the case of *Smith* v. *Mawhood* (2), and that the contract was not illegal so as to make it absolutely void. The plaintiffs and defendant were not parties conspiring to defeat the Act. The English cases show that where a penalty is exacted it does not invalidate the sale. Licensing Acts have always co-existed in England with the Excise Acts; does it make any difference, if it be so, that the two Acts are consolidated in this country? The English Licensing Act of 1872, 35 and 36 Vic., c. 94, s. 13, is almost identical with s. 67 of the Bengal Act. The case of *Hormasji Motabhai* v. *Pestanji Dhanjibhai* (3) is decided on the principle laid down in *Ritchie* v. *Smith* (4); the case of *Debi Prasad* v. *Rup Ram* (5) is also decided on that principle; but *Ritchie* v. *Smith* does not belong to the class of cases which should be considered in answering the question referred. All that *Ritchie* v. *Smith* decides is that where one man takes advantage of another man's license, such an act is illegal, but the case does not refer to an outside purchaser. Section 14 only provides that the operation of the Act may be suspended in certain cases; the Government may have had reason for exempting where the consumption is small. The argument of the other side on s. 50 is answered by *Bailey* v. *Harris* (6). Section 23 of the Contract Act only affirms the English law on the subject. The case of *Lorymer* v. *Smith* (7) was a sale by sample and has no application to the particular case; here the defendant bought specific goods on their own judgment—*Cf.* *Burnby* v. *Bollett* (8).

(1) 6 C. B., 472.
(2) 14 M. & W., 452.
(3) I. L. R., 12 Bom., 422.
(4) 6 C. B., 472.
(5) I. L. R., 10 All., 578.
(6) 12 Q. B., 905.
(7) 1 B. & C.,
(8) 16 M. & W., 644; 3 M. & W., 390.

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The opinion of the Court (WILSON and TREVELYAN, JJ.) was delivered by

WILSON, J.—The principal question which has been raised before us in this reference is whether a contract for the sale of fermented liquor, by a person who has not obtained a license under Bengal Act VII of 1878, is illegal and therefore void.

The sections bearing upon the matter are these: Section 4 has defined exciseable articles as including spirituous and fermented liquors. Section 11 says that no person shall sell any exciseable article without a license from the Collector. Section 53 says whoever manufactures or sells any exciseable article without a license shall be liable to a fine not exceeding Rs. 500 for every such manufacture or sale, and then come the provisos, with the last of which I shall deal presently.

A number of cases have been cited to us from the English Courts upon the question, in what cases and under what statutes the imposition of a penalty is to be construed as intended to prohibit the Act to which the section refers, and in what cases that penalty should be regarded as only a means for protecting the revenue.

Two tests have been applied in many of the cases. First, in a number of cases it has been said, and the view has been acted upon, that in an Act intended only for the raising of revenue and the protection of that revenue, a clause imposing a penalty may well be construed, not as prohibiting a transaction in such a sense as to make it illegal and void, but as providing a means of enforcing the liability of the person on whom the penalty is imposed.

If that test be applied in the present case, it seems to me that the conclusion at which the Judge of the Small Cause Court has arrived is correct; because it seems to me clear that the Act with which we are dealing is not, and was never intended to be, a mere Act for the protection of the revenue, but that it is an Act having other objects of public policy in view as well. In the first place we should be shutting our eyes to what is a matter of common knowledge, that in this country as well as in England for many years past, from a period long before this Act was passed, public men have never supposed that the regulation of the traffic in intoxicating liquors is to be dealt with upon considerations of

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revenue alone. In the second place, when we turn to the Act itself, I think the same thing is apparent from its express language, in which respect it is unlike the Act of 6 George IV, c. 51, under which several of the cases cited to us were decided, particularly the case of *Smith* v. *Mawhood* (1). The preamble of the Act is a good deal wider than if the object were merely the protection of the revenue. It is this: "Whereas it is expedient to consolidate and amend the laws relating to the manufacture sale and possession of exciseable articles;" and there is another object, "the collection of the revenue derived therefrom;" and as we go through the Act, we find that these two objects are kept, side by side, in view, the regulation of the drink traffic in the interests of the public, and the protection of the revenue. This is particularly apparent from certain sections in the Act. Section 14 was referred to, and it is not without weight. The 29th section is an important section, because it shows that a license is to be cancelled, not only on grounds affecting the revenue, but on grounds affecting the character of the holder, showing, I think, clearly, that in that section at any rate the Legislature had in view public morals, as well as the protection of the revenue.

Then s. 62 has been referred to, and I think rightly referred to, because it shows that a difference is made between the holding the same article for a purpose connected, and for a purpose not connected, with the traffic in intoxicating drinks.

Then s. 67 expressly deals with cases of misconduct on the part of a person holding a license, and the permission of misconduct by such a person of a character directly connected with public morals and not with the receipts of revenue. And again, s. 80 is another special provision relating to the case of cantonments. The object of s. 80, I apprehend, can be nothing but the securing of the discipline, the morals and good conduct of the troops in cantonments. The consequence then to my mind is, that both on general principles and the terms of the Act itself, this Act cannot be said to be a mere Revenue Act, but it is an Act having no doubt the protection of the revenue in view, but having in view also important objects of public policy.

(1) 14 M. & W., 452.

Another test has been applied in various cases in order to determine whether the penalty imposed by an Act was intended to create a prohibition so as to invalidate a specific act of dealing in violation of the law in which the penalty is to be found, and that is, to see whether the penalty is imposed in general terms for the carrying on of a trade, or for the omission of some preliminaries which the law imposes on the opening of a trade, or some such general purpose as that, or whether the penalty is imposed on each specific act of dealing. In the latter class of cases, the Courts have been prone to construe the penalty as creating a prohibition, and therefore vitiating each transaction.

If that test be applied in this case, it is clear that the penalty is imposed on each specific act. Section 53 of the Act imposes, for selling an exciseable article without a license, a fine of so many rupees for every such sale. Thus what the Legislature had in view was not merely the general carrying on of the trade of a trader, but every specific act of sale. This is the more apparent from some of the provisos which follow the general words in that section. The third proviso says that "Nothing contained in the first clause of this section applies to the sale of any imported spirituous or fermented liquors purchased by any person for his private use and so disposed of upon such person quitting a station or after his decease." That proviso shows that in the view of the framer of the section, if it had not been for the proviso, any officer who, on being ordered from one station to another in Bengal, sold his stock of wine to his successor, or to anybody else, would be liable to the penalty if he did so without having a license; and that if the executor of any gentleman dying in Calcutta were to sell his stock of wine, without taking out a license, he would, but for the proviso, be liable to a penalty. All this shows that the thing which the Legislature had in view was any act of sale; and that according to the authorities is strong to show that the penalty is imposed with the view of prohibition.

The result then is, that, according to the authorities, this case falls within the class of those in which the penalty is imposed for the purpose of prohibition, and not of those in which it is imposed solely for the benefit of the revenue.

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Several cases decided in the Indian Courts have been cited, but they do not throw a very strong light upon this case. They related not to contracts of sale but contracts of a different character. The result is that, in my opinion, we ought to answer the fourth question referred to us in the affirmative, and as that disposes of the whole case, it is unnecessary to answer any of the others.

Attorney for the plaintiffs: Baboo *Kali Nath Mitter.*

Attorney for the defendant: Baboo *B. N. Bose.*

T. A. P.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice Tottenham.

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NILMONY PODDAR AND OTHERS (APPELLANTS) *v.* QUEEN-EMPRESS (RESPONDENT.)*

Sentence—Separate sentences for rioting and grievous hurt—Penal Code, ss. 71, *para.* 1, 144, 147, 148, 324—*Act VIII of* 1882—*Criminal Procedure Code* (*Act X of* 1882), *s.* 35.

Per Curiam (TOTTENHAM, J., dissenting).—Separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 149 of the Penal Code. *Empress* v. *Ram Partab* (1), approved; *Loke Nath Sarkar* v. *Queen-Empress* (2), overruled.

REFERENCE to a Full Bench made by Mr. Justice Mitter and Mr. Justice Macpherson under the following order:—

The question reserved by us in this case is, whether separate sentences passed upon the appellants Nos. 1, 3, 4, and 5 for offences of rioting and hurt are legal.

The finding of the lower Court which we have upheld is that these appellants, who are guilty of rioting, did not individually commit any acts which amounted to voluntarily causing hurt;

* Full Bench on Criminal Appeal No. 78 of 1889, against the judgment of Mr. B. L. Gupta, Officiating Sessions Judge of Farridpore, dated the 8th December 1888.

(1) I. L. R., 6 All., 121.